Supreme Court of the United States.

TERM OF 1875-'6.

No. 692.

THE HOT SPRINGS CASES.

JOHN C. HALE

vs.

THE UNITED STATES, HENRY M. RECTOR, AND OTHERS.

BRIEF FOR RECTOR, IN OPPOSITION TO HALE.

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ROBERT W. JOHNSON,
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JOHN C. HALE *vs.* THE UNITED STATES.

BRIEF FOR HENRY M. RECTOR, IN OPPOSITION TO HALE.

John C. Hale sets up two claims to the Hot Springs, one as assignee of the widow and heir of John Perciful, of a right of pre-emption claimed under the act of April 12, 1814; the other under an attempt to locate the same quarter section with a Cherokee pre-emption claim, under the act of May 26, 1824.

The latter claim is not insisted on, and is too clearly worthless to need remark.

The Petition of Hale alleges that in November, 1840, he and one Milus H. Woods purchased one-half of the pre-emption claim of Perciful, agreeing to pay $3,000 for it absolutely, and $10,000 if the claim should be confirmed and one-half of the land conveyed to them when patent should have issued.

Record: 4.

The evidence proves this to be true.

Record: 131–2, 3, 198.

Afterwards, the widow having died, the sole heir conveyed to Hale, for $8,000, the whole of his interest under the supposed right of pre-emption.

Record: 134.

Thus Milus H. Woods, so far as these conveyances could assign the claim, owned one-fourth of it, and Hale three-fourths. It is not alleged by Hale that he ever purchased the interest of Woods, nor does he state that Woods ever parted with it, or whether he is living or dead. On the face of his petition, and by his testimony and evidence his claim is for only an undivided three-fourths.

Rector owns the other fourth. Woods is dead. He sold his interest to Jacob Mitchell and gave him possession of part of the quarter section; and Mitchell sold to Rector and gave the same possession, and this and no other Rector continues to have.

Testimony of Wilson Stidham, Joseph Hopson, Elias W. Rector, and William H. Lewis. Record: 434, 438, 441, 273, 274, ff.

Hale and Woods, as appears by receipts in evidence, paid the widow and heir, on account of their purchase, at different times in 1840, $1,680.04, $150, and $2,009.11; and Woods paid, in 1841, $373.42.

Record: 200, 201, 132.

We deny that John Perciful ever "actually inhabited and cultivated" the tract of land or quarter-section, or any part of it, whereon the Hot Springs are, prior to the twelfth day of April, 1814. We say that the testimony proves that he never *inhabited* it at all, but a place some miles distant, on the River Ouachita, and that he never personally cultivated a foot of it.

By the act of 12th April, 1814, he must, to entitle himself to pre-emption under it, have actually inhabited or cultivated the quarter section, including the Hot Springs. This he had to prove to the satisfaction of the Register and Receiver. This he failed to do. The Register found that he failed to establish actual inhabitancy and cultivation.

Hignight proved that he lived about seven miles from the springs, on the Washita river, in 1811. There Hignight

lived with him until the latter part of 1813. In 1815 he was living at the same place. There he continued to live until he died, in 1836, and there his widow and son always lived. There were his and their farm, homestead, and domicile always; and while Hignight lived with him there, from some time in 1811 to the latter part of 1813, he neither cultivated any ground at the springs nor lived there.

Testimony of Hignight: Record, 118.

Jacob Barkman was at the springs in June, 1812. There were some houses, camps, and tents there, in possession of various persons who went there to use the waters. A man named Fitz-Gibbons had a little patch of ground in cultivation. In 1812, 1813, and 1814 he was at Perciful's residence on the Washita. Perciful lived there, but went to the springs to supply venison and other things to the invalids there, but he did *not* cultivate there in either year. He did not live at the springs at all until 1819, and then the houses he had were left in his charge by Manuel Prudhomme, who, Hignight says, with his brother, built a house there in 1812 or 1813. In 1813 and 1814 one Foster had a garden there. Even after 1819 Perciful only stayed there during the warm season, returning home in the fall. In 1812 or 1813, Hignight says, Morrow cultivated a little piece of ground as a garden, and *all* the arable land in the valley was only about one acre and a half.

Record: 114, 119.

Bernard Bonne was a native of Arkansas, reared at the post of Arkansas, son of Michel Bonne, who made the well-known "trace," or path, from Pine Bluff, on the Arkansas, to the Hot Springs. In October, 1813, he found no one living at the Springs, and no houses were there. He had to cut away the bushes to get to the springs. Perciful then lived on the Washita. In May, 1814, there were forty or fifty people at the Springs from Natchitoches, and some

of them built houses. Perciful was not there, and still lived on the Washita.

Record: 121.

And Perciful told Richard C. Hawkins that he went to the Springs in 1807 and camped and hunted there, and in 1808 he went to the Ouachita and settled there.

Record: 123.

The truth is, that, at that day, no man would have settled at the Springs, to inhabit and cultivate. The country in the vicinity is hilly, barren pine land, and there was no land anywhere to make a farm on, except in the alluvial "bottom" of the Ouachita river. In that region of country, at that day, nobody *settled*, except on the rivers, and Perciful no more *inhabited* the quarter-section including the springs, than any visitor who camped there did.

Consequently, nobody proves that he "inhabited and cultivated" there. He did both on the Ouachita river, at his home.

His widow stated, on the 2d of June, 1838, that Perciful *claimed* the premises in May, 1814, and that her uncle rented an old clearing of him for a garden. In 1813, Foster had rented part of the same clearing of Perciful, and raised vegetables on it. Perciful did not even build the houses there. He had others to build them, for the use of the water and board. She says he always had *possession*, even while he lived on Red river; and she was exceedingly careful not to say a word about his ever living on the Washita.

Record: 97.

Hignight explains all that. People going there to remain long would build cabins and huts, as Prudhomme did, and when they went away, would give them to Perciful, who had hunted for them and furnished other provisions. Nobody would have recognized any claim of his to the waters of the springs. And his widow, so far from proving "*actual*"

habitancy and cultivation, proved the contrary, as clearly as it was possible to prove it. Morrow cultivated the old clearing, Hignight says, in 1812 or 1813, and there was no other cultivation there. Fitz-Gibbons cultivated a patch in 1812, Barkman says, and Foster in 1813 and 1814, both on the northeast side of the creek. Barkman says there was perhaps an eighth of an acre cleared. Hignight says about a fourth, and it was sixty or eighty yards northeast from the main spring.

Warren Dunham, her witness, said that there was, in June 1814, about an acre and a half cleared and under fence, which John Gibbons was cultivating, and said he had rented it from Perciful, and cultivated it during the two years before (1812 and 1813.) Perciful claimed to be proprietor, and people rented from him. He did not say one word about Perciful inhabiting or cultivating at the Springs, or drop a hint as to where he did live and cultivate.

Record: 99.

In 1843, Mrs. Perciful swore that in the spring of 1814 Perciful rented to her a house and garden at the Springs, and that she cultivated the latter; and that *in that year* he also cultivated a garden there, and *he told her* that he had cultivated it in 1812 and 1813, which is no proof, and positively proven to be false besides. She also said that he settled "on said place at said Hot Springs, A. D. 1807, and from the size of the peach trees he had enclosed left her without grounds to doubt his statement." As the proof is abundant that he settled on the Washita, it is a charitable construction that, being an ignorant old woman, she meant that place.

Record: 105.

Thomas Holman swore that Perciful built the first house at the Springs in 1811 or 1812, and did cultivate on said quarter section in 1812 and 1813, and that he was in pos-

session "by personal residence of himself and his family *and tenants* at said Springs, up to his death." He makes no proof *at all* of actual habitancy there by him prior to 1814. Such ex-parte affidavits amount to very little. And we are not surprised to find that he told Hawkins quite a different story, and one agreeing with the testimony of Barkman and Hignight, and this thirteen or fourteen years before he testified.

Testimony of Holman: Record, 105.
Testimony of Hawkins: Record, 111.

Barkman proved that Dunham's statement agreed with his own testimony and Hignight's, and that Perciful never did live at the Springs until 1819.

Record: 112.

And Rapley, that Perciful told him that he moved about, camping from place to place, hunting, until he settled on the Washita.

Record, 113.

James Neel's ex-parte statement was offered to the register and receiver, and objected to because he was living, and within seventy miles. So was Silas Dod's; but both were received.

Neel says he was at the Springs in the summer of 1812. He says Perciful was *in possession* of them, and Holman living with him there, having a house near one of the main springs, and also a garden, which somebody cultivated. He does not prove that Perciful did it, and is careful not to mention Perciful's house and farm on the Washita. The statement is ex parte and worthless, and as to the cultivation proves nothing. Dunham proves who *did* cultivate, *i. e.* John Gibbons.

Neel's Testimony: Record, 224, 238, 248.

Silas Dod proves that in June, 1812, Perciful was *in pos-*

session of the Springs. About an acre was cleared and cultivated, and he understood it was Perciful's. He claimed the place and improvement. There is not in this statement the least proof of habitation or cultivation by Perciful.

Record: 248.

The testimony of James Neal was taken in 1853, under a proceeding to perpetuate it. He swore that in the summer of 1812 Perciful was living in a little log cabin at the Springs and keeping a few boarders, and there was a little garden called his on the east side of the creek. In 1814 Perciful was living in the same house. He fails to prove any cultivation by him, and his *residence* there during the visiting season did not constitute habitation. His home and domicile were elsewhere.

Test. perpet.: Record, 224.

Thomas Woodward proves that Perciful lived in a log-house at the Springs with his wife in 1816, and *said* that he came there in 1807, and had been living there from that time until then.

Record, 229.

Adam Stroud knew Perciful in 1811, and says that he was at the Hot Springs in 1811, 1812, 1813, and 1814, "and said John Perciful then and there lived" in one or two huts, and was recognized as head and proprietor of the premises, and cultivated a piece of ground on the east side of the creek.

Record, 234.

It is plain enough from this testimony what the facts were. Hignight says that he and Perciful were like brothers, and he had better and longer opportunity to know the facts, and better cause for accurately remembering them than any of the others, and his character and Barkman's are amply vouched for by the Register and others. Perciful settled on the Washita when he first *inhabited* anywhere. Before

that he had no more habitation than a trapper in the mountains. He lived there until he died, and his wife lived there after him. Living near the Springs and getting possession of the cabins there, for it was but seven miles from the Springs to his home, he may have staid there, some years, in during part of the season for visitors. He no more *inhabited* there than they did; nor did he before 1814 cultivate there. The proof to the contrary greatly preponderates. He was having land cleared and cultivated at home, and he was hunting deer and buffalo.

"Camps" are sometimes built of logs, with an open front and sloping roof. A man could build a log cabin with about the same labor, and many of the visitors built them. When the season ended they went away, and so did Perciful, if he had been there during the season. Of course he came and went. Having his home at so short a distance, he would never be many days absent from it; and while Hignight was there, during 1812 and 1813, as well as the latter part of 1811, he lived at home, and neither inhabited nor cultivated at the Springs. He claimed the improvements; that was all. Until the law of 1814 passed he could not have thought of a pre-emption.

There is a simple *experimentum crucis*, that is conclusive of this case. Let the Court suppose the Indian title never to have existed, that Perciful is here claiming title to the land he lived on upon the river Ouachita, by virtue of a pre-emption right under the act of 1814, and that the claim is to be decided upon the testimony in this case, affidavits and all. There would not be a moment's doubt as to his right of pre-emption. *There* he inhabited prior to April, 1814, for there he *settled* and made it his home, and it continued to be so until he died. There he cultivated, prior to April, 1814. He might *cultivate* there and at the Springs, at one and the same time; but he could not *inhabit* both places at once, any more than a man can sit on two stools at once, when there is a field or river between them.

He could not have *two* rights of pre-emption under the same law.

Hale states in his petition that when the claim of Perciful was first presented to the Register and Receiver (in 1838) its allowance was refused, on the sole ground of the location of part of the quarter-section by the New Madrid claim of Langlois.

Record, 4.

That is true (Record, 104;) but the petition does not state the fact, *fatal to his case*, that in 1843, when it was again presented, and application with tender of the price made to enter the quarter section, the Register and Receiver decided against it on three grounds, and that the third was, *that the claimant had failed to make out her case, under the act of April* 12, 1814; and that the Commissioner of the General Land Office concurred with the Land Officers, *upon all the points decided.*

Record, 106.

Report of the Secretary of the Interior, in answer to a resolution of the Senate relative to the Hot Springs of Arkansas, ordered to be printed September 9, 1850, and forming Ex. Doc. No. 70, 1st Session 31st Congress, p.

Letter of Commissioner, Dec. 6, 1843, to Hon. Edw. Cross, Chancery Record, 509.

Afterwards another opportunity was afforded the claimant, and, upon a full hearing and careful consideration, the Register decided that inhabitancy was not proven, but on the contrary, was disproven. The Receiver thought it proven. Failing to make the fact appear to the satisfaction of both, the claimants had no longer a claim to assert. The decision was final, exactly as a judgment of affirmance is, when the Court is equally divided. It is not possible to open the inquiry again. There is final judgment on the

facts, as conclusive forever as the verdict of a jury. Both officers not finding the evidence sufficient, on the second hearing, the *original* decision of their predecessors remained undisturbed. Whether it could have been reversed by a new finding, if both *had* agreed, we need not inquire; nor as to the power of the Commissioner to open the case, not because he disagreed with the officers and his predecessor, as to the first finding, but to give the parties an opportunity to make further proof.

He granted a new trial; and upon that trial, the parties failingto make proof to the satisfaction of the Register and Receiver, the former decision, of 1843, was a final judgment against the claimants, which was not reviewable anywhere else, nor is it opened or set aside by the act of 1870. It was a decision as to the *facts* of inhabitancy or habitation, and cultivation, and imports absolute verity.

The Register and Receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emption under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final.

It is fully conceded, this Court has said, that when the land officers decide controverted questions of fact, in the absence of fraud or imposition or mistake, their decision of those questions is final, except as they may be reversed on appeal in the Department.

Johnson *vs.* Towsley: 13 Wallace, 86.

There not only is no attempt made to *establish* that there was any fraud or unfairness practised by anybody in connection with the investigation of the facts as to the alleged habitation and cultivation of Perciful; but there is no allegation of that sort made by Hale in his pleadings. Not only does he not impeach the decision of the Register, made

against him on the facts, but he does not even *mention* the decision. He simply ignores it. By the law, the facts of habitation and cultivation had to be found to the satisfaction of the Register *and* the Receiver. The Receiver, in 1851, decided that he *did* inhabit and cultivate. The Register, carefully discussing the testimony, decided that he did not.

Therefore Hale does not impeach this decision, but asks a new trial on the facts; and on the facts, if the question could be re-examined here, this Court, it seems to us, could not but agree with the Register.

Neither does the petition notice the fact that in rejecting the application for a pre-emption made in November, 1843, both the Register and Receiver expressly stated that, admiting the *validity* of the settlement, the claimant, (Sarah Perciful,) in her proof had failed to make out her case under the act of 12th April, 1814.

Record: 104.

We do not desire to interpose against Hale, any inequitable or narrow objections. If Perciful was entitled, under the law, by having inhabited and cultivated, and did not abandon his right, let him have his part of the land. The finding in 1843, and disagreement of the Land Officers in 1851 are sufficient to disprove the claim. The opinion of the Register William H. Etter, upon the last hearing, is a complete demonstration of the falsehood of the claim that Perciful inhabited and cultivated at the Hot Springs, prior to 1814. He *inhabited*, where his hme was; and he inhabited the place on the Ouachita, seven miles from the Springs, as much before 1814 as afterwards. His counsel, or himself, if he were living, would be at a loss to put his finger on the time when he ceased to *inhabit* the Springs and *began* to inhabit where his home was.

The act of 1814 did not require that the party to whom it gave a right of pre-emption, should be in possession of the land and residing on it, at the time of its passage. If

he *had* actually inhabited and cultivated it, and no other person rightfully claimed it, and he had not removed from the Territory, the law gave him the pre-emption. The reason, no doubt, was that settlements on the public lands ceded by France had been forbidden by law, and intruders were required to be removed, it being wholly unlawful, moreover, to settle on land to which the Indian title had not been extinguished; and the law meant to give the right to persons who might have been removed by public force, if they had previously inhabited and cultivated.

But after the law passed, a party to whom it gave a right of pre-emption could abandon and lose the right, by neglecting to return to the possession of the land, and if Perciful *had* a right of pre-emption, he lost it by removing with his family to Red River, in 1816, and remaining absent a year or two. Mrs. Perciful, in her affidavit made in 1838, swore that this was in 1819, and that they remained on Red River nine or ten months.

Record, 98.

But Jacob Barkman testified that Perciful went and resided on Red River two years, and never lived at the Springs until 1819, and he states that it was in or about the year 1816 that he went to Red River. Hignight met him when he was moving, thinks it was in 1816, and that he remained something like two years. He took his family and goods with him, including even two mill-stones.

Record, 112, 116, 120.

To *inhabit* a tract of land is, of course, to *live* and reside on it, and there have one's domicile; and, of course, to go away from it and have a dwelling and a home elsewhere, is to abandon it. So far as the Department of the Interior can settle these questions, it has done so. It has held that one does not *inhabit* land unless he makes it his permanent home; that if he goes away from it and begins to build

elsewhere, he abandons it; that it is not enough for him to be there *part* of the time, at nights, if he lives elsewhere, with his mother; that he must actually reside on it. See Opinions and Decisions at pp. 421, 2, 3, 4, 5, 6, 7, 8, 9 and 430 of 1 Lester's Decisions and Land Laws; and that "actual and continuous personal residence" is necessary, 2 Id., 275.

See also 20 Johns, 208; 8 Wend., 140; 12 Peters, 319; 25 Penn. St. Rep., 45; 11 Id., 113; 11 Serg. & Rawle, 340; Shields *vs.* Walker, 2 Tenn., 115; Wyncoop *vs.* Heath, 10 Watts, 420; Heath *vs.* Biddle, 9 Barr, 273.

But Perciful not only abandoned any pretence of right he may have had to the Hot Springs, by removing to Red River; but he sold and conveyed whatever rights he had there, on the 4th of October, 1824, with his right of pre-emption and every advantage that Paxton might obtain by any claim, in consideration of the sum of one thousand dollars, acknowledged to have been paid him. The conveyance was proven by a subscribing witness, and recorded, in Clark County, in 1827.

Record, 269.

Fitz-Gibbons or John Gibbons, Foster, and others, who also lived at the Springs for a while, and really did cultivate a little bit of the land, had better rights of pre-emption under the act of 1814 than he had; for they *actually* cultivated, and he did not. Nobody had any, for nobody *inhabited* the land prior to 1814. Perciful no more *inhabited* the land there, than the Frenchmen from Natchitoches did, who came there in the summer, and built camps and houses, which they gave him when they went away. It is not shown that *he* ever built one there.

The act of 1814 gave him no pre-emption, because there could be none to land, the Indian title whereto was not extinguished. And however the *fact* may have been as to that title, the question whether there was such a title, and the

question whether it should be respected, were questions for the political departments of the Government to settle; and moreover this Court has recognized the fact of the existence of the Quapaw title, and held that it prevented a pre-emption right from attaching, under the act of 1814.

Thredgill *vs.* Pintard: 12 Howard, 37.

The objection that the country was Indian country was not removed until 1843. Meanwhile, in 1820, Rector's location was made, when as yet Perciful had no claim at all. We have endeavored to show, and think we have shown, that this location was valid, and received no aid from the act of 1843, no additional validity, the only effect of that act being the removal (as to it) of an unfounded objection. It follows that, against it, valid originally, in 1820, the pre-emption claim under the act of 1814, not valid in 1814 or in 1820, could not be asserted by virtue of the act of 1843. The act of 1843 *could* not by operation *ex post facto* relate, and make the pre-emption valid from the beginning, so as to make invalid the New Madrid location, validly made in 1820. An act of Congress cannot have a retroactive effect upon one claim or title, so as to affect an intervening valid claim or title.

The New Madrid location was not helped by the act of 1843, *i. e.*, it was not made valid; no *valid* objection to it was removed; and therefore that act reached back and put out of the way for it an unlawful obstacle, an illegal and baseless objection, which had not invalidated it, but had merely prevented its ripening into a perfect title by express grant. It merely authorized that to be done which should have been done twenty years before, *i. e.*, a patent to issue on it; and it *could* not have that effect as to the invalid pre-emption, as against the New Madrid location. If it had intended that effect, it would have been retroactive to the prejudice of a vested right and valid title, and therefore void.

One would suppose that a person who abandons land, removes from it, settles and lives elsewhere for years, and sells and conveys all his right to it and to any pre-emption, could hardly urge, with a grave face, that he still retained a right of pre-emption, when others have for forty years occupied the land.

JOHN C. HALE *vs.* HENRY M. RECTOR.

Hale sets up an agreement between himself and Rector, made on the 11th of May, 1843, by which Rector conveyed to him an undivided fourth of his claim, in consideration of one-half of Hale's interest under the claim of pre-emption of Perciful, agreeing to pay him also half the value of certain buildings in the Hot Springs valley.

Record, 83, 235.

Of this matter this Court has no jurisdiction under the law.

The agreement was never carried out. Rector afterwards purchased of Jacob Mitchell the improvements that Mitchell had purchased of Milus H. Woods, who got them by the sale made by the widow and heir of Perciful to him and Hale. Woods and Hale had made a division by a line, and this line continued between Hale and Rector.

In the spring or summer of 1843 Rector had removed to the Hot Springs from Little Rock, and there the agreement was made; but in six or seven months he removed to Little Rock, being appointed marshal of the Arkansas district, and there and in Saline county remained until 1865; thus totally abandoning the agreement, which Hale states only in part, and does not allege that the buildings were ever valued or any money ever paid him.

Test. of Ann B. Rapley: Record, 436.

Test. of Joseph Hopson: Record, 438.

Rector and Hale, while Rector was at the Springs in 1843, kept a hotel together; but when Rector removed to Little Rock, the buildings and improvements they occupied remained in Hale's possession.

Test. of Hopson: Record, 438.

It is therefore evident that the agreement was abandoned, as the Supreme Court of Arkansas has decided a sealed agreement may be, without formal agreement in writing to abandon.

But this is so clearly a matter within the jurisdiction of the Court of Equity in Arkansas that we shall not waste time in discussing it. If each of these three principal claimants had sold a hundred lots of ground to as many men, each of the three hundred could hardly have come into the Court of Claims, with his separate suit to have the equities between him and his author settled by that Court and this.

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